Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

ALLAN LEWIS PETITIONER

V.

TEXTRON AUTOMOTIVE INTERIORS, AND JAMES D. HOUSTON

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALLAN LEWIS
86 CHESTNUT HILL R.D.
ROCHESTER N.H. 03867
603 335-6368

GHPP

APPELLANTS QUESTIONS FOR REVIEW

1.Can a District Court Judge alter or amend a Congressional Enactment (29 USC 2101 and The Dept. of Labor's 20 C.F.R. 639 Final rule).

2. Can a Judge allow the defendant Textron to use business reasons that were known 90-days prior to plant closure announcement, to circumvent there responsibility for layoffs after a announced Plant Closing when it affects 50 or more employees within a 30-day period.

3. Can a Judge force a Appellant to go beyond the provisions of the statute of the Law in question.(29 USC 2101 and The Dept. of Labor's 20 C.F.R. 639 Final rule).

4. Can a Judge refuse to take under consideration the Appellants sworn statement in District Court reciting The Dept. of Labor's 20 C.F.R. 639.3 (b) (Plant Closing) specifically that WARN Act is triggered whenever a

company announces a Plant Closing, then layoff 50 or more employees within a 30-day period.

5. Can the court denied the Appellant's request to certify to the Attorney General a question of constitutionality of WARN. 28 U.S.C. 2403 and former 28 U.S.C. 401 (1946) was designed to specifically provide the United States with the right to participate in cases which might otherwise, at the hands of private litigants, render act of Congress unenforceable without adequate protection of the public interest.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The parties to the appeal in the Untied States Court of Appeals for the First Circuit, whose judgment petitioners request be reviewed, included petitioner ALLAN LEWIS and all similarly situated employees from the Defendants New Hampshire Operations (Dover and Farmington)

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STATEMENT OF THE CASE.....1

A. On December 7, 1994 Textron announced the consolidation of there Dover and Farmington N.H. operations as Textron's N.H. Automotive Operations under control Vice President N.H. Operations James Houston. (facts not in question)(single site of employment 639.3 (i)).

B. The Public Announcement To The City of Dover N.H. on 2 June 1995 that the Dover N.H. operations will close and consolidate with the Farmington operations.

C. The Plain Language of WARN (29 U.S.C. 2101) and The Dept. of Labor's 20 C.F.R. 639 (WARN) Workers Adjustment and Retraining Notification Final Rule.

D. The Affidavid from Sandy Green Human Resource Manager, that in March of 1995 they knew the DN-5 Taurus and Sable operating unit would close in May or June of 1995, and the projected employment loss of 85 employees.

E. The Public Announcement to the Employees of Textron's N.H. Operations on 2 June 1995. From President Mike Weston, announcing the Closing of the Dover N.H. operations. (The expected loss of 75 salaried employees)

F. The listed 75 employees who experienced an employment loss after the 2 June 1995 announcement of Plant Closing to trigger WARN notification.

REASON FOR GRANTING THE WRIT

1. Writ of certiorari should be granted based on (1) The fact that the State court of last resort court of last resort or of a United States court of Appeals"(2) the lower court has departed so far from the accepted course of judicial proceedings, as to call for this The Supreme Court of The United States to exercise it's supervisory power.The Lower court's decision conflicts with the relevant decision of this the Supreme Court of the United States of America.....17

2. The issues raised by this petitioner are identical to the issues of Certiorari To The United States Court of Appeals For The Eight Circuit with respect to United Food and Commercial Workers v. Brown Shoe Company except we don't have a union. Supreme Court Justice Souter reversed and remanded the lower courts decision, and we request the same action.....14

3. The issues reised by this petitioner are identical to the Issues reised on Writ of Certiorari to The United States Court Of Appeals For The Third Circuit (Nos. 94-834 and 94-835). North Star Steel Comp. -v- Charles A. Thomas and Crown Cork& Seal Co -v- United Steelworkers of Amreica, AFL-CIO-CLC.... With some exceptions and conditions, (29 U.S.C. 2103 Sec.4. Exemptions.) WARN forbids an employer of 100 or more employees to " order a plant closing or mass layoff untill the end of a 60-day period after the employer serves written notice of such an order". 29 U.S.C. 2102(a). Supreme Court Justice Souter delivered the opinion of the Court, in which Rehnquist, C.J. and Stevens, O'Connor, Kennedy, Thomas, Ginsburg, and Breyer, JJ., joined. Scalia, J., filed an opinion concurring in the judgment.....14

4. The Supreme Court has cautioned that where a statute expressly provides a particular remedy or remedied, the lower court must be chary of reading others into it. Trans-American Mortgage Advisors, Inc -v- Lewis 444 U.S. 11,20,100 S. Ct 242,247,62 L.Ed.2d 146 (1979) 29 U.S.C. 2107 demands the use of 20 C.F.R. 639 to direct the WARN notification.....17

5. Citing - John A. Pavao -v- Brown & Sharpe Manufacturing Company Civ. A. No.CA-91-0292P United States District Court D. Rhode Island, dated Feb. 18, 1994. 844 F. Supp 890. The court ruled that Plant Closing occurring within the 30-day time period defined by 29 U.S.C. 2101(a)(2), PLANT CLOSING "CAUSATION" IS NOT RELEVANT. The "separate and distinct action and causes" analysis applies only to 90-day plant closing proscribed by 29 U.S.C. 2102(d), not to termination's of 50 or more employees occurring within one 30-day period. Judge Boudewyns expressed this very clearly: "All that WARN requires is the shutdown of an operating unit or facility that "results in " an employment loss; Whether or not other factors are associated with the decision to layoff is besides the point.".....6

6. Citing - James A. Washington -v- Aircap Industries Corporation Civ.A. No.2:91-3153-18. United States District Court South Carolina 831 Fed Supp. If the intent of Congress is clear, that is the end of the matter: for the court....must give effect to the unambiguously expressed intent of congress... Regulations that are substantive and promulgated by an agency pursuant to statutory authority have the force of law. "The WARN Act specifically directed the Department of Labor (DOL) to prescribe such regulations as may be necessary to carry out this Act 29 U.S.C. 2107.....7

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REGULATIONS

The Dept. of Labor's 20 C.F.R.639.3 Sec (b)(i)(j)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Allan Lewis and all similarly situated employees from the Defendants N.H. operations respectfully petition that a Writ of Certiorari issue to review the February 5, 1998 decision of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The court of appeals decision dated February 5, 1998 has not yet been reported.

JURISDICTION

The court of appeals decision of which review is sought was rendered in an opinion filed on February 5, 1998. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in pertinent part gives Congress the power to make laws. These laws are made under the authority of the United States, and shall be the Supreme Laws of the land.

29 U.S.C. 2101 Workers Adjustment And Retraining Notification Act. is reproduced in partl in Appendix.

The Dept. of Labor's Regulation 20 C.F.R. 693 Final Rule.(Workers Adjustment And Retrainin Notification Act. is reproduced in part in Appendix.

New Hampshire Labor & Employment Employer Liability for Employees Act is reproduced in part in Appendix

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STATEMENT OF THE CASE

Appellant filed suit against the defendant Textron for violation of 29 U.S.C. 2101 (WARN). **(See App.K)** The Appellee Textron announced to the employees in March of 1995 that the DN-5 Taurus and Sable contracts were not renewed, and these production lines will close. As defined by 20 C.F.R. 639 .3 (j) The DN-5 Taurus and Sable operations was an organizationally and operationally entity which produced a distinct product, and work function. On 2 June 1995 Textron announced to the City of Dover N.H., that they were closing their Dover N.H. operations and consolidating them into their Farmington N.H. location.**(See App.E)** On that same date of 2 June 1995 an all employees meeting was held at the Farmington N.H. location to announce the closing of the Dover Facility.**(See App F,G,H)** The closing announcement was presented by Mr. Michael Weston, President of the Textron's Interior's Division from Troy Michigan. This announcement was an official public notification of the Plant Closing, *citing* **ATLANTIC**

STAGES, 78 NLRB 553 (1948) " Employers are held responsible for statements of supervisors" (See App. M)

After 2 June 1995 Textron laid off 75 employees within a 30-day period making the layoffs subject to WARN Notification,**(See App.J App.K App. L Sec(2)(2))** as defined by 29 U.S.C. 2101 and 20 C.F.R. 639.3 Plant Closing. **Citing SAXION v.TITAN-C-MANUFACTURING, INC. 86 F. 3d 553 (6th Cir. 1996). "That on March 2, 1990 plant superintendent John Sutton held a meeting to announce that the facility would be closing permanently". The court found the plant superintendent has the authority to announce a Plant Closing (See App. M).**

An important function of the Supreme Court is to resolve disagreements among lower courts about specific legal questions. Another consideration is the importance to the public of the issue. The Supreme Court of The United States has jurisdiction in this matter under Rule # 10(b) "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another

state court of last resort or of a United States court of appeals". The lower court has departed so far from the accepted course of judicial proceedings, as to call for this The Supreme Court of The United States to exercise it's supervisory power.

The imperative public importance in this case is the protection of the American Worker from being terminated without notice. The Worker Adjustment and Retraining Notification Act (WARN) provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closing. Advance notice provides American workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow workers to successfully compete in the job market.

THE ARGUMENT.

The conflict in question is the decision rendered by The New Hampshire District Court Granting Summary Judgment to the Defendant (Textron) under WARN statutes, **(See App. C,D. Affirmed A,B).** Against ALL other lower courts decision on the same federal issue, 29 U.S.C. 2101 and the Dept. of Labor's 20 C.F.R. 639.3 (Plant Closing.). In all listed cases the defendant's announced the closing of a facility or operating unit as defined by (20 C.F.R. 639.3) **(See App. L)**. Only The New Hampshire District court allowed the defendant to submit business reasons for the layoffs after a announced plant closing, which affected 50 or more employees within a 30-day period. This is the issue being raised before this Honorable Court. **(See App. C. affirmed App.A).**

In framing this issue, this court must bear in mind that exception from remedial acts are to be construed

narrowly, **Olsen -v- Lake Country Inc., 955 F.2d 203,206 (4th Cir.1991).**

Citing- **Eloy Marques -v- Telles Ranch Inc No.C 93-20187 JW United States District Court, California. The first issue to be addressed is whether there was a "shutdown" "An employment action that results in the effective cessation of production of the work performed by a unit, even if a few employees remain, is a shutdown" 20 C.F.R. 639.3(b). III. LEGAL STANDARDS--To preclude the entry of summary judgment, the non-moving party must bring forth "facts that might affect the outcome of the suit under the governing law.... Appellant brought forth a list of 75 employees who suffered an employment loss, within a 30-day period after a announced plant closing, from a single site of employment.** (See App. J).

Citing- **CAROLYN FRYMIRE 858 F. Supp. 1081 (D.Colo. 1994 Labor Relations 7.1 In order to qualify for WARN Act protection, plaintiffs must meet each of three elements of threshold requirements: (1) 50 or more**

employees: (2) suffered employment loss: (3) at single site of employment. WARN Act 2 et seq.,29 USCA 2101 et seq." Also citing United Mine Workers Intern.-v-Harman Mining Co. 780 F.Supp. 375,377 (W.D.Va.1991).

Citing - **John A. Pavao -v- Brown & Sharpe Manufacturing Company Civ. A. No.CA-91-0292P United States District Court D. Rhode Island, dated Feb. 18, 1994. 844 F. Supp 890. The court ruled that Plant Closing occurring within the 30-day time period defined by 29 U.S.C. 2101(a)(2), PLANT CLOSING "CAUSATION" IS NOT RELEVANT. The "separate and distinct action and causes" analysis applies only to 90-day plant closing proscribed by 29 U.S.C. 2102(d), not to termination's of 50 or more employees occurring within one 30-day period. Judge Boudewyns expressed this very clearly: "All that WARN requires is the shutdown of an operating unit or facility that "results in " an employment loss; Whether or not other factors are associated with the decision to layoff is besides the point."**

Citing - **Oil Chemical And Atomic Workers -v- American Home Products Corp. No. S91-50M. United States District Court N.D. Indiana 790 F.Supp 1441 N.D. Ind 1992 Because the November layoffs were implemented after the approval and announcement of the closure plan, the court agrees with OCAW that a reasonable trier of facts could infer that the November layoffs were part of the plan and hence part of the plant closing.**

Citing - **James A. Washington -v- Aircap Industries Corporation Civ.A. No.2:91-3153-18. United States District Court South Carolina 831 Fed Supp. If the intent of Congress is clear, that is the end of the matter: for the court....must give effect to the unambiguously expressed intent of congress... Regulations that are substantive and promulgated by an agency pursuant to statutory authority have the force of law. "The WARN Act specifically directed the Department of Labor (DOL) to prescribe such regulations as may be necessary to carry out this Act 29 U.S.C. 2107.**

Citing - **Local Union 7107 -v- Clinchfield Coal Company No. 96-1731. United States Court of Appeals Forth Circuit.-Labor Relations 7.1- Employer relying on exception to WARN Act's ordinary requirement of sixty day advance notice of plant closing or mass layoffs bears the burden of persuasion. 29 U.S.C. 2101-2109: 20 C.F.R. 639.9. WARN Act is remedial legislation and thus, its exceptions are construed narrowly.**

Citing - **Dennis Loehrer -v- McDonnell Douglas No.95-3964. United States Court of Appeals, Eight Circuit "Additionally, because unforseeable business circumstances operate as an affirmative defense to WARN liability, the employer bears the burden of proving the existence of conditions giving rise to the exception. General Dynamics, 821 F.Supp at 1311, 20 C.F.R. 639.9 (1996).**

Citing - **Jones -v- Kayser-Roth Hosiery, Inc No.Civ 3-89-545 United States District Court E.D. Tennessee 748 F. Supp 1276**

III. BUSINESS CIRCUMSTANCE EXCEPTION

The defendant contends that the closing of the Harriman plant was caused by the irrevocable loss of the JCP account, the plant's largest and most profitable customer; that the loss of this business was not reasonably foreseeable on April 26, 1989, the date that notice would have been required; that, instead, the loss of the JCP business was sudden, dramatic, and unexpected; that KR provided plaintiffs with as much notice as was practicable; and that it did not violate the notice requirements of the WARN Statute.

29 U.S.C. 2102(b)(2)(A) provides that an employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonable foreseeable as of the time that notice would have been required.

29 C.F.R. 639.9(b)(1) and (2) explain that an important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, ... might ... be considered a business circumstance that is not reasonably foreseeable...

The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market.

The decisions rendered by the United States District Court for the District of New Hampshire conflict with decisions rendered by other Federal Courts on the same Federal issue as cited from the Federal Practice Digest.

Statute (key 239) Exemptions from remedial statutes are to be narrowly construed. **Markowitz -v- Northeast Land Co., 906 F.2d 100.**

D.D.C.1989. Remedial statutes is to be construed in favor of those whom it was intended to protect. **Wagner Seed Co -v- Bush, 709 F.Supp. 249 affirmed 946 F.2d 918,292 U.S. App.D.C.44.**

D.S.C. 1990 While remedial legislation should be construed broadly to effectuate the purpose of the legislature, this canon of statutory construction does not authorize court

to ignore the plain wording of the statute. **Hines -v- United Parcel Service Inc. 736 F.Supp 675.**

Statute (key 219) C.A.10 1991. Considerable weight must be given to agency's construction of statutory sections it is entrusted to administer .**Davis -v- Director, Office of Worker's Compensation Programs, U.S. Dept. of Labor, 936 F.2d 1111**

C.A. 10 1990. An administrative agency's interpretation of a statute which the agency is entrusted to administer is entitled to considerable deference by a reviewing court. **Bernstin -v- Sullivan, 914 F.2d 1359. Also Abramson -v- Georgetown Consulting Group Inc 765 F. Supp 255, affirmed 952 F.2d 1391.**

C.A. 11 (Ala.) 1990 Court will accord great weight to responsible agency's interpretation of a statute as manifested in regulations. **Alacare Home Health Service, Inc -v- Sullivan, 891 F.2d 850. Also Omni Packing Inc. -v- U.S. I.N.S. 733 F.Supp 500.**

C.A.5 (Tex.) 1989. Under the Administrative Procedures Act, court may set aside agency action only if it is arbitrary, capricious, or an abuse of discretion: court is not to substitute its judgment for that of the agency, and is to be extremely deferential to agency's interpretation of its governing legislation, 5 U.S.C.A. 7069(2)(A). **Weisbrod -v- Sullivan, 875 F.2d 526.**

N.D.N.Y. 1987 Court must upheld agency's reasonable interpretation of statute that it is charged with administering. **Bersani -v- U.S. E.P.A. 674 F.Supp 405. affirmed 850 F.2d 36.**

The decisions rendered by the United States District Court for the District of New Hampshire conflict with decisions rendered by the Supreme Court of the United States.

The Supreme Court has cautioned that where a statute expressly provides a particular remedy or remedied, the lower court must be chary of reading others into it. **Trans-America Mortgage Advisors, Inc v Lewis 444 U.S. 11,20,100 S.Ct 242,247,62 L. Ed.2d 146 (1979)** 29 U.S.C. 2107 demands the use of 20 C.F.R. 639 to direct the WARN notification.

The issues raised by the petitioner are identical to the issues of Certiorari To The United States Court of Appeals For The Eight Circuit with respect to **United Food and Commercial Workers v. Brown Shoe Company (No 95-340)** except we don't have a union. Supreme Court Justice Souter reversed and remanded the lower courts decision.

The issues raised by this petitioner are identical to the Issues raised on Writ of Certiorari to The United States Court Of Appeals For the Third Circuit (Nos. 94-834 and 94-835).

North Star Steel Comp -v- Charles A. Thomas and Crown Cork & Seal Co -v- United Steelworkers of America, AFL-CIO-CLC

With some exceptions and conditions, (29 U.S.C. 2103 Sec.4. Exemptions.) WARN forbids an employer of 100 or more employees to "order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order". 29 U.S.C. 2102(a). Supreme Court Justice Souter delivered the opinion of the Court, in which Rehnquist, C.J.and Stevens, O'Connor, Kennedy, Thomas, Ginsburg, and Breyer, JJ., joined. Scalia, J., filed an opinion concurring in the judgment.

Petitioner also requested The United States Court of Appeals certify to the Attorney General Appellant's constitutional question under F.R.A.P. rule 44, and was DENIED. Appellant Allan Lewis requested that the court certify the fact to the Attorney General that the Appellant is questioning the judges failure to enforce a Congressional Enactment 29 U.S.C. 2101 and the Dept. of Labor's 20 C.F.R. 639.3 Final rule. Under this rule the Clerk of Court thereupon must certify such fact to the Attorney General. The 28 U.S.C. 2403 statute was designed to specifically provide the United

States with the right to participate in cases which might otherwise, at the hands of private litigants, render acts of Congress unenforceable without adequate protection of the public interest. The history of this statue makes it clear that it is the Attorney General who should decide whether, under all the circumstances, intervention is advisable. Under 28 U.S.C. 2403, it is required that a District or Appeals Court, even though it finds that a constitutional question is frivolous, give notice to the Attorney General, leaving to him the decision whether to intervene. **Wallach v. Lieberman (1966, CA2 NY) 366 F2d 254, 10 FR Serv2d 747, 2 ALR Fed 969.** Certification under 28 U.S.C.S. 2403 (b) is the duty of the court that should not be ignored, even if claim is obviously frivolous or may be disposed of on other grounds. *on* *(***Merrill v. Addison 985, CA2 NY) 763 F2d 80.**

SUMMARY OF ARGUMENT.

Petitioner contends that the New Hampshire District Court ruling is unconstitutional because it is in conflict with Congress' clear language and intent of the WARN Statute. (29 U.S.C. 2101). Citing - **Zweibon -v- Mitchell 516 F.2d**

594 Constitutional Law-45- An unconstitutional practice, no matter how inveterate, cannot be condoned by the judiciary. (per Wright, Circuit Judge, with three additional Judges concurring in the judgment). The Supreme Court is final arbiter of constitutional guarantees. Rosen -v- Louisiana State Bd. of Medical Examiners, 380 F.Supp. 875, affirmed 95 S.Ct. 767, 419 U.S. 1098, 42 L.Ed.2d 795.

The Supreme Court has stated- that Pro se papers are to be held to a "less stringent standard, **Hines -v- Kerner 404 U.S. 519, 520** (1972)(per curium), than those drafted by attorneys, e.g. **Ayala Serrano -v- Lebron Gonzalez, 909 F.2d 8, 15 (1st Cir.1990)** Pro Se pleading are to be liberally construed in favor of the Pro Se party. The court must resolve all reasonable doubt in favor of the non moving party prior to awarding Summary judgment. **Meyer -v- Riegal Products Corp. 720 F.2d 303,307 n. 2 (3d cir.1983),cert.dismd., 465 U.S. 1091, 104 S.Ct. 2144,79 L.Ed.2.d 910 (1984): Smith -v- Pittsburgh Gage & Supply Co., 464 F.2d 870,874 (3d Cir.1972).**

CONCLUSION

Based on the clear language and intent of Congress in writing this legislation,(WARN) 29 U.S.C. 2101 and the regulations of the Dept.of Labor's 20 C.F.R. 639 covering this Act, the Supreme Court of the United States must exersise its supervisory powers to resolve the conflict between two lower courts on the same Federal issue. Petition for a writ of Certiorari should be Granted.

RESPECTFULLY

Allan W Lewis

ALLAN LEWIS PRO SE

I hereby certify that on this day of March 19,1998 a copy of the foregoing was hand delivered to Attorney on file John Alexander at One Capitol St Concord NH. and two others sent by First Class mail to Attorney on file of Banta, Cox & Hennessy 55 West Monroe Street, Suite 3500, Chicago IL 60603.

APPENDIX A

(NOT FOR PUBLICATION)
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1751

ALLAN LEWIS,

Plaintiff, Appellant

v.

TEXTRON AUTOMOTIVE INTERIORS AND JAMES D. HOUSTON, Defendant, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

(Hon. James R. Muirhead, U.S. District Judge)

Before

Lynch, Circuit Judge,

Aldrich and Campbell, Senior Circuit Judge.

Allan Lewis on brief pro se. Don A.Banta, Ann L.Crane and Banta,Cox & Hennessy on brief for appellees.

December 15,1997

Per Curiam. We have carefully reviewed the briefs and record on appeal and affirm the judgment below. The only issue the appellant argues in his brief, thus the only matter before us,[1] is Whether there was a genuine issue that a plant closing caused layoffs triggering the Worker Adjustment and Retraining Notification Act. 29 U.S.C. 2101-2109. When the appellee presented evidence that a plant closing did not cause the layoffs of which the appellant complained, it was incumbent upon the appellant to adduce contrary evidence. Celotex Corporation v. Catrett, 477 U.S. 317, 323 (1989). He did not do so.[2]

Affirmed. Loc. r.27.1.

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1 See United States v. Zannino, 895 F.2d 1,17 (1st Cir. 1990).

2 Accordingly, appellant's motion for attorney's fees and pre-argument conference are also denied

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
No. 97-1751

ALLAN LEWIS,

Plaintiff, Appellant

v.

TEXTRON AUTOMOTIVE INTERIORS AND JAMES D. HOUSTON, Defendant, Appellees.

Before

Lynch, Circuit Judge,

Aldrich and Campbell, Senior Circuit Judge.

ORDER OF COURT
Entered February 5, 1998

After due consideration, the appellant's petition for reconsideration is DENIED. We previously considered all relevant points raised. Accordingly, appellant's pending motion for relief from judicial abuse, an investigation of the constitutionality of the Worker Adjustment and Retraining Notification Act and a stay pending investigation are also DENIED.

By the Court
PHOEBE MORSE

CLERK.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Allan Lewis

v. Civil No. 96-185-JM

Davidson Rubber Co Inc et al

ORDER

As matters now stand, this action involves pro se plaintiff Allan Lewis's allegation that defendant Textron Automotive Company violated the Workers Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. 2101 et seq., when it failed to provide written notice to certain employees (including plaintiff) who were let go in and around June 1995. A number of motions, including the parties, cross-motion for summary judgment, are presently pending.

Because plaintiff's pleading were not entirely clear as to the exact layoffs on which his claim is premised, and because discovery had not yet closed, the court felt somewhat ill-equipped to decide the summary judgment

motions as they were initially presented. Accordingly, the court issued as order (dated April 16,1997) directing (1) plaintiff to file a submission specifying the layoffs underlying this lawsuit, and (2) defendant to file a responsive submission explaining the reason for each and every layoff specified by plaintiff. Pursuant to this order, plaintiff filed under seal a list of 75 layoffs--all made in June 1995-- on which his pleaded claim is based. But see infra at note 2. Defendant them filed a responsive statement averring under oath that (1) each of these 75 employees was laid off for business reasons "unrelated to the plan to consolidate the Dover and Farmington production operations", and (2) delineating the business reason for each layoff. Thereafter, on May14,1997, the court held a hearing on the pending motions and the recent submissions.

At the hearing, the parties first stipulated that discovery is closed and that the pending motions are ripe for resolution. Next, defendant orally agreed to withdraw its motion for leave to file a counterclaim in the event that its summary judgment motion is granted. The court then asked plaintiff whether he had any evidence to counter defendant's

sworn assertion that the layoffs at issue were made for various reasons unrelated to the plant closing. Plaintiff responded that he had no such evidence.[1] Instead, plaintiff made clear that he reads the Act's requirements as being activated whenever a company decides to close a plant and thereafter lays off from that plant 50 or more employees within any 30-day period. See 29 U.S.C. 2101 (a) (2).

Although plaintiff's position has intuitive appeal, it overlooks the fact that the WARN Act protects only employees "affected" by a plant closing, see 29 U.S.C. 2102 (a) (1), and defines the term "affected employees" as an employee "who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing," 29 U.S.C. 2101 (a) (5) (emphasis supplied). In other words, the Act protects only those who lose their employment because of the plant closing: it does not protect those who lose their employment for reasons unrelated to the plant closing.

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[1] The court assumes that, in so responding, plaintiff meant that he had no such evidence other than the press clippings, attached to his motion for summary judgment,

which (if deemed to be admissible evidence) tend to show that defendant had decided to close its Dover facility prior to the time the layoffs at issue in this case were made.

See Oil Chemical and Atomic Workers Int' Union v. American Home Prods. Corp., 790 F.Supp. 1441,1445-47 (N.D. Ind. 1992), cf.Alter v. SCM Office Supplies,Inc., 906 F.Supp. 1243, 1250-51 (N.D. Ind. 1995).

Here, defendant has introduced credible and admissible evidence that the 75 layoffs of which plaintiff complains (including plaintiff's own layoff) were made for reasons unrelated to the closing of the Dover plant. In so doing, it has met its Rule 56 burden of adducing evidence that there is no genuine issue of material fact as to whether its failure to give statutory notice to the employees affected by these layoffs violated the WARN Act. See Fed.R.Civ. P.56(b), (c), and (e). Plaintiff therefore was obliged to go beyond the mere making of contrary allegations and to set forth specific facts showing that there is a genuine issue for trial. Fed. R.Civ.P. (f). Plaintiff did not do so. Accordingly, the court awards defendant summary judgment See id.[2]

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[2] The court is aware that plaintiff has recently moved for leave to file a supplemental pleading so as to expand the list of layoffs affected by the plant closing to include those

For the reasons stated, the court grants defendant's motion for summary judgment (document no.35) and denies plaintiff's motion for summary judgment (document no.44) and for leave to file a supplemental pleading (document no 74). Defendant's motion for leave to file a counterclaim (document no.53) is denied in accordance with defendant's representation at the May 14, 1997 hearing. Finally, plaintiff's motion for punitive damages (document no. 56 is denied.

The Clerk is directed to close this case.

SO ORDERED.

James R. Muirhead

United States Magistrate Judge.

Date: May 20,1997

cc: Allan Lewis, pro se
John T. Alexander, Esq.
Don A. Banta, Esq.

Farmington employees who were "bumped" by senior Dover employees transferred to Farmington. Because, for the reason stated above, plaintiff has not and will not be able to establish that he himself was laid off as part of a plant closing, he dose not have standing to assert the claims of any other Textron employee under the WARN Act. The court therefore denies plaintiff's motion on grounds of futility. See Foman v. Davis, 371 U.S. 178,182 (1962).

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Allan Lewis

v. Civil No. 96-185-JM

Textron Automotive Interiors

ORDER

The argument plaintiff appears to make in his motion for reconsideration-- that the balancing out of the Taurus and Sable armrest and console product manufacturing operations constituted the closing of a separate "operating unit" within the meaning of the WARN Act, see 29 U.S.C. 2101 (a) (2)-- is untimely. And even if it were timely, the record evidence is insufficient to support a finding that said balancing out constituted the closure of "an organizationally or operationally distinct product, operation or specific work function within or across facilities at the (Dover) site." 20 C.F.R. 639.3(j) (defining "operating unit"). Accordingly, I deny the motion (document no.77).

SO ORDERED

James R. Muirhead
United States Magistrate Judge

Date June 2,1997 .

APPENDIX E

DOVER ECONOMIC DEVELOPMENT CORP.

MEMO

To : DEDC Board Members
From: Beth Thompson
Date: June 2,1995
Re: Textron Consolidation

Renny Perry, Steve Stancel, Mike Joyal and I met with 3 officials from Textron: Denny Houston, Vice President of Operations; Joe Paul, Vice President of Human Resources from Detroit; and Randy Lund, Human Resources Manager. We were informed that within the next 18-26 months, Textron will be consolidating its Dover manufacturing facility to its Farmington location.

The Farmington facility is newer and better able to handle the needs of the newer manufacturing processes. The injection molding process requires higher ceiling which are not available in Dover. Additionally, Textron owns enough land in Farmington to expand if there is ever the need.

With both facilities operating at less that 50% capacity, they feel they can't maintain the overhead of two underutilized building.

Nine hundred people currently work at the manufacturing facility. Except for 75 salaried employees, between 800 and 850 people will continue to have jobs. Textron is hoping to accomplish the layoffs through natural attrition. They feel that between the senior employees and those that chose not to

commute to Farmington this reduction can be accomplished without layoffs.

For any layoffs that do result from the consolidation, Textron has committed to helping the employees find alternative employment (although not retraining) and would take any help from us that we have to give.

The ATC Technical Center and the Tooling Center which both employ approximately 90 employees each will remain in Dover.

Regarding the facility itself, Textron does not yet know what it will be doing building which is approximately 300,000 sf. They will have a better idea later as the move progresses. They anticipate using some of the building for storage as they begin the move.

Asked if the City could help market this building, Textron said they would be willing to entertain some ideas when the time is right. However, the decisions would come from corporate but they were sure they would take any help they could get. The feel building could be subdivided and has some very good office areas.

Public Transportation to and from the Farmington facility was brought up. Textron would be interested in having COAST run some routes between Dover and Farmington and would likely subsidize it for their employees for a couple of years. Apparently, there are businesses in Farmington and Dover which have expressed interest in the same thing in the past. We will set up a meeting with COAST to explore this issue.

The current layoffs at the plant are part of the cyclical automotive market. This is something that has been going on

over the years. In the past couple of weeks 64 people have already been let go with about 60 or 70 more layoffs anticipated. Because of the cyclical nature of these layoffs, Textron does not consider this a permanent reduction.
We also discussed the Elan Service Packaging Company from Georgia. Textron feel that they may not be able to make the figures work for this guy but that he was creative enough to do some good business in this area. They have not ended discussion with him but urged us to continue working with him because of the good things he could offer in this area.

I will be sure to keep you updated on events in this regard as we hear more from Textron.

APPENDIX F

EMPLOYMENT
SECURITY
32 South Main Street Concord N.H.
03301-4857

March 20, 1996

Al Lewis
86 Chestnut Hill R.d.
Rochester N.H. 03867

Dear Mr. Lewis

The following information comes from a spreadsheet prepared by the NH Job Training Council. Until July of 1995, that agency was responsible for the Rapid Response program.

The spreadsheet shows that NHJTC was notified of upcoming layoffs at Textron on April 7 1995. At that time, the total number of employees is listed as 1100. The number of employees laid off during the period of 5/ 95 to 7/ 95 is listed as 150.

I am enclosing a copy of the Guide to Advance Notice of Closing and Layoffs, for your information

Sincerely

Donald P. Kelley
Programs Technician.

APPENDIX G

NEW HAMPSHIRE JOB TRAINING COUNCIL

April 12, 1996

Mr. Allan Lewis
86 Chestnut Hill R.d.
Rochester, N.H. 03867

Dear Mr. Lewis,

I as writing this letter in response to our phone conversation on April 11th. A Rapid Response Orientation from the New Hampshire Dislocated Worker Unit was held on May 19,1995 for the workers at Textron Automotive Interiors in Dover, New Hampshire. The company was targeted, and all of the services were provided by our staff at New Hampshire Job Training Council.

I hope this information is adequate to meet your needs. If I can be of any further assistance, please call me.

Sincerely

Robert A. Stephen, Director
Workforce Development
RAS/do

cc. Ray O. Worden, Executive Director.

APPENDIX H

STATE OF NEW HAMPSHIRE
DEPARTMENT OF RESOURCES AND ECONOMIC DEVELOPMENT, OFFICE OF BUSINESS AND INDUSTRIAL DEVELOPMENT CONCORD N.H.03301

September 26, 1996

Allan Lewis
86 Chestnut Hill R.d.
Rochester, N.H. 03867

Dear Mr. Lewis

I as responding to your phone inquiry about what my understanding was relative to the closing of the Dover facility of Textron

You specifically asked me if it was my impression that the Dover operation would eventually be closed and the workforce consolidated into the Farmington plant.

My response to you was that in-as-much as that was the course of action outlined by the company in their press statements, it was my understanding that this was what was going to occur.

Sincerely

Willam E. Pillsbury, Jr.
Director

APPENDIX I

NEW HAMPSHIRE BUSINESS REVIEW
N.H. 'S ONLY STATE WIDE NEWSPAPER

Dated June 9-22, 1995

SPACE APLENTY

Textron's move from Dover leaves 277,200 square feet available to businesses looking for room

Textron is closing a massive (277,200 square feet) plant in Dover, but the city may soon prosper in the space business. No, not with astronauts from Houston or Cape Canaveral. The city may be able to attract another business or businesses to the space, said state Business and Development Director Willam Pillsbury, in an effort to fine a silver lining in Textron move.

The company is not going far. The move is a consolidation with its operations in nearby Farmington, while its research and development branch in Dover will stay put. Still, that much empty space will mean at least a temporary decline in the tax base for Dover and an estimated 75 salaried employees will lose their jobs. Textron laid off 64 employees two weeks earlier.

Companies are looking for available space and are having trouble finding it, Pillsbury told the Union Leader. " We'll be ready to work with Textron on helping them identify potential tenants for that facility, if they are so inclined" Textron officials have said they're not sure what the company will do with the building.

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Allan Lewis Plaintiff

v.
Civil Action N0.96-185-JM

Textron Automotive Interiors Defendant

PLAINTIFF 'S STATEMENT IDENTIFYING THE SPECIFIC LAYOFFSTHAT WERE MADE IN VIOLATION OF THE WARN ACT.

PUBLIC LAW 100-379-AUG.4,1988 29 USCS 2101 (WARN) SEC.5. ADMINISTRATION AND ENFORCEMENT OF REQUIREMENTS.

(a) CIVIL ACTION AGAINST EMPLOYERS.- (1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act shall be liable to each aggrieved employee who suffers an EMPLOYMENT LOSS as a result of such closing or layoff.

SEC 2 DEFINITIONS; EXCLUSION FROM DEFINITION OF LOSS OF EMPLOYMENT

(6) subject to subsection (b), the term 'employment loss' means (A) an employment termination, other than a

discharge for cause, voluntary departure , or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more that 50 percent during each month of any 6-month period.

The following individuals experienced an employment loss as a result of the employer not complying with Section 3 of WARN. An employment loss at a site of employment during any 30 day period following a closure announcement, affecting 50 or more employees, excluding part time employees, triggers the 6o day notification mandated by WARN.

EMPLOYEE	DATE OF HIRE	DATE TERMINATED
MICHAUD, APRIL L	4/3/94	6/1/95
JACKSON, WENDELL L	12/20/93	6/1/95
LASTER, WILLAMS O	3/26/95	6/23/95
GARLAND, VALERIE M	12/2/93	6/9/95
AHIER, LOUISE M	7/14/93	6/9/95
KIM , NANNA	6/26/94	6/1/95
POLIQUIN, DANNY S	6/26/94	6/1/95
GAUDETTE, TERRRY R	11/22/93	6/1/95
PARE, TONYA A	9/22/93	6/1/95
WEATHERSPOON, MELVIN C	7/24/94	6/1/95
BOUNPHAKHOM, KHINTHAVONE	9/1/93	6/1/95
COLE, TRACY L	12/20/93	6/1/95
HANCOCK, MICHAEL E	1/10 94	6/2/95
LAUZE, KEVIN P	5/31/93	6/3/95
SOUCY, DINA M	2/22/94	6/3/95

BERUBE, DAVID J	7/26/93	6/4/95
SAWYER, KEITH W	9/22/93	6/4/95
YORK, HAROLD M	12/20/93	6/4/95
BERG, EDWARD D	12/20 93	6/4/95
CHOI, MICHAEL P	2/27/94	6/4/95
LANDRY JR, REO J	6/13/94	6/4/95
PETTIS, BETTY J	6/13/94	6/4/95
JACKSON, MARC R	6/13/94	6/4/95
DONALD, KENNETH F	2/6/94	6/4/95
LEMAY, LISA A	7/10/94	6/4/95
MILLER, WILMA L	7/31/94	6/4/95
KIMBALL, ROBERT N	12/6/93	6/9/95
BROCHU, ROY D	1/10/94	6/9/95
TERZOL, LAURENCE A	2/13/94	6/10/95
HILL, NICOLE E	3/1/93	6/21/95
MCGRARRY JR,HAROLD	8/7/94	6/16/95
PERRY, SEAN P	12/13/93	6/1/95
ROSE, ERIKA L	8/28/93	6/2/95
GARVIN, ERIC J	6/19/94	6/1/95
GUPTA, SANTOSH K	10/18/93	6/1/95
WALTERS, RICHARD C	8/12/93	6/2/95
HEMANDEZ, HECTOR	8/30/93	6/21/95
HUSSEY, KEITH J	8/25/93	6/30/95
MORGAN, JAMIE A	8/30/93	6/30/95
MONAHAN, THOMAS J	8/16/93	6/15/95
COUTURE, FAYLENE C	10/10/93	6/1/95
NEWHALL, HEATHER D	11/27/94	6/1/95
TWOMBLY JR, ROBERT E	3/13/94	6/2/95
HERSEY, BLAIR P	12/6/93	6/2/95
STICKLES, RITA M	8/21/94	6/4/95
JACOBS, GERTRUDE F	12/18/94	6/4/95
WETZEL.CHARLES L	12/11/94	6/4/95

ROSS, KEITH A	11/20/94	6/4/95
COYNER, MARK T	8/23/93	6/9/95
BARLOW, GEORGE W	9/7/93	6/9/95
POND, DIANA L	1/24/94	6/10/95
JUDD, ALEXANDER J	12/20/93	6/12/95
VONGSA, LAONG D	7/6/93	6/12/95
SARAVONG, TITI	10/26/92	6/16/95
MORSE, DAVID A	8/16/93	6/16/95
CHORMAN, WILLAM P	8/30/95	6/16/95
ORDWAY, KEITH D	10/11/93	6/16 95
GERVAIS, TROY M	10/18/93	6/16/95
SULLIVAN, TIMOTHY J	9/20/93	6/16/95
GAEDTKE, LARRY J	6/7/93	6/22/95
VANNASENG, LYLY	8/2/93	6/23/95
LEWIS, ERIC W	8/3/93	6/23/95
KNIGHT, BRENDA M	10/4/93	6/23/95
DENNIS, WHIT C	11/20/94	6/23/95
KOPASKY, KENNETH J	11/27/94	6/23/95
BLACK, MATHEW J	1/31/94	6/8/95
HOWARD, DAVID B	2/6/94	6/9/95
CUNNINGHAM, LUCILLE A	8/16/93	6/16/95
MARSHALL, KIMBERLY J	12/18/94	6/4/95
ELLIOT, ALLEN R	8/16/93	6/14/95
HOUGHTON, CHARLES T	2/6/94	6/16/95
GARNETT, CHRISTINE	8/23/93	6/16/95
DESROSIERS, CLAIRE A	9/21/88	6/23/95
JANIS, JOAN M	11/14/88	6/30/95
LEWIS, ALLAN W	8/23/93	6/30/95

APPENDIX K

PUBLIC LAW 100-379-AUG,4 1988
Workers Adjustment and Retraining Notification Act
Business and industry. Employment and unemployment 29 U.S.C. 2101.

29 U.S.C. 2101 Sec. 2 DEFINITIONS; EXCLUSIONS FROM DEFINITION OF LOSS OF EMPLOYMENT.

(a) Definitions.- As used in this Act-

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding ant part-time employees;

(6) Subject to subsection (b) the term "employment loss" means any employment termination other than a discharge for cause,voluntary departure or retirement, (B) a layoff exceeding 6 months or (C) a reduction in hours of work of more than 50 percent during each month of any 6 month period:

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers.

Sec.3. NOTICE REQUIRED BEFORE PLANT CLOSING AND MASS LAYOFFS. 29 U.S.C. 2102.

(A) Notice to Employees, State Dislocated Workers Units and Local Governments,-- An employer shall not order a plant closing or Mass layoff until the end of a 60-day

period after the employer serves written notice of such an order-

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated workers unit (designated or created under title 111 of the Job Training Partnership Act) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

Sec.4. EXEMPTIONS. 29 U.S.C. 2103

This Act shall not apply to a plant closing or mass layoff if--

(1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking; or

(2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this Act. Nothing in this Act shall require an employer to serve written notice pursuant to section 3(a) of this Act when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act: Provided, That nothing in this Act shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act.

Sec.5 ADMINISTRATION AND ENFORCEMENT OF REQUIREMENTS. 29 U.S.C. 2104

(A) Civil Actions Aginst Employers.--(1) Any employer who orders a plant closing or Mass layoff in violation of section 3 of this Act shall be liable to each

aggrieved employee who suffers an employment loss as a result of such closing or layoff

(5) A person seeking to enforce such libility, including a representative of employees or a unit of local government aggrived under paragraph (1) or (3) may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the cost.

(7) For purpose of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 3, did not receive timely notice either directly or through his or her representative as required by section 3.

(b) Exclusivity of Remedies.--The remedies provided for in this section shall be the exclusive remedies for any violation of this Act. Under this Act, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

Sec.8. AUTHORITY TO PRESCRIBE REGULATIONS.

(a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this Act. Such regulations shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for appropriate service of notice as required by this Act.

APPENDIX L

THE DEPARTMENT OF LABOR'S FEDERAL REGISTER
Vol. 54.No 75/ Thursday, April 20, 1989/ Rules and Regulations.

The Dept. of Labor's Federal Register 20 C.F.R. 639 Final Rule (b) Section 639.3 (b) Definition of Plant Closing. This section closely replicates the statutory definition of the term "plant closing" and applies the definition to other WARN requirements. There were few comments on the regulatory language itself, and they supported the approach taken.

A comment made in the preamble to the proposed regulations, suggesting that a plant closing occurs only where the threshold number of workers are terminated or laid off as a direct result of one or more plant closing, did however, draw considerable comment. A number of commenters supported this interpretation. Several commenters opposed it, pointing to the structure of the statutory language. DOL has revisited this issue and has decided to revise its earlier position. Section 2 (a)(2) of WARN defines plant closing as the permanent or temporary shutdown of *** one or more facilities or operating units*** if the shutdown results in an employment loss during any 30-day period for 50 or more employees*** This language, particularly the use of the words "results in" contemplates that BOTH employment losses of the employees who work in the facility(s) or operating unit(s) and those who lose their jobs as the direct result of the shutdown(s) are to be counted in determining when a plant closing has occurred. Thus, for example, if the 45 workers computer data entry department at a plant is closed and, as a direct result of that closing (and within 30 days of the closing), 5 computer programmers also are terminated, a covered plant closing has occurred. Another commenter suggested that a series of closing or layoffs

should be considered a plant closing or mass layoff" only if each stem from the same business decision, personal action or other distinct cause" where no distinct cause accounts for a threshold number of employment losses there is no WARN coverage. DOL, disagrees with this interpretation. WARN Section 2(a)(2) and (3) say nothing about cause. Under the language of those provisions, one merely counts up all the employment losses that occur in a 30-day period to determine coverage.

Section 639.3(j) Definition of Facility or Operating Unit

The regulations adopt common sense definitions of the term "Facility and Operating unit" within a single site of employment. These terms are important for determining whether a plant closing has occurred. DOL has defined these terms in a manner which attempts to define physically and operationally distinct entities for purposes of determining wheather a plant closing, the shutdown of a distinct entity, has occurred.

The DOL agrees that only distinct structural or operational entities within a single site of employment are intended to be included as operating units. The definition revised reads; "an organizationally or operationally distinct product, operation or specific work function.

The reason for the use of the term "operating unit" in WARN is to apply the protection of the law to small units of workers in a larger plant when their units are closed.

APPENDIX M

LABOR & EMPLOYMENT IN N.H. ISSUE 2 (1994)
EMPLOYER LIABILITY FOR EMPLOYEES' ACTS

9-3 RESPONSIBILITY FOR ACTS OF SUPERVISORS.

Usually , employers are held responsible for acts and statements of supervisors which interfere with the rights of employees. This may be so even if the conduct occurs outside of the supervisor's responsibilities and even if the conduct is not specifically authorized.